1959

The Servicemen's Dilemma: Divorve without Domicil

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THE SERVICEMEN'S DILEMMA: DIVORCE WITHOUT DOMICIL

I. INTRODUCTION

Effective May 6, 1957, the Texas divorce statutes were amended by the addition of the following provision:

> Any person serving in a military branch of the United States who was not previously a citizen of the state of Texas and who at the time of filing a petition for divorce has been stationed in a military installation or installations in the State of Texas for a continuous period of twelve months and in the county where the suit is filed for a continuous period of six months next preceding the filing of same, shall for the purposes hereof be deemed to be an actual bona fide inhabitant and resident respectively of the State of Texas and of the county where such military installation is located.[1]

The traditional jurisdictional basis for divorce actions is domicil,[2] defined as presence within the state with the intent to remain indefinitely or, at least, no present intent to remove,[3] and the United States Supreme Court has held domicil indispensable for a divorce decree to be entitled to full faith and credit in sister states.[4] The quoted statute illustrates one way in which various legislatures have attempted to make it possible for servicemen to maintain divorce proceedings in the states where they are stationed without being required to *allege* the intent necessary to establish domicil as traditionally defined.[5]

Thus, a statute such as this possibly may fail to confer the jurisdiction necessary to entitle a decree rendered under its authority to full faith and credit in other states. There may also be some question whether a state has the *power* under such a statute to render a judgment which is *internally* valid. This latter problem was raised by a 1954 case, *Alton v. Alton*,[6] which held that an attempt by the Virgin

[1] Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1957).

[2] Williams v. North Carolina (II), 325 U.S. 226 (1945); Andrews v. Andrews, 188 U.S. 14 (1903); Bell v. Bell, 181 U.S. 175 (1901); Brashear v. Brashear, 99 S.W. 568 (Tex. Civ. App. 1907); Restatement, Conflict of Laws §§ 110-11, 113 (1934). The statutes of many states use the word "residence"; "residence" has been interpreted uniformly as requiring domicil. Cohen v. Cohen, 64 N.E.2d 689 (1946); see 17 Am. Jur. Divorce and Separation § 281 (1957).

[3] Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), dismissed as moot, 347 U.S. 610 (1954); Gallagher v. Philadelphia Transp. Co., 185 F.2d 543 (3d Cir. 1950); Morland, Divorce and Marriage § 58 (1946); Restatement, Conflict of Laws § 15 (1934).

[4] See authorities cited note 2 supra. As to *when* the decree may be attacked, see note 74 infra.

[5] Alabama - Ala. Code tit. 7, § 96(1) (1955); Florida - Fla. Stat. ch. 46.12 (1957); Georgia - Ga. Code § 30-107 (Supp. 1939); Kansas - Kan. Gen. Stat. Ann. § 60-1502 (1949); New Mexico - N.M. Stat. Ann. § 22-7-4 (1953); Oklahoma - Okla. Stat. Ann. tit. 12, § 1272 (1957); Texas - Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1957).

[6] 207 F.2d 667 (3d Cir. 1953).

Islands to grant a divorce to someone not technically domiciled there was a denial of due process although both parties appeared and neither contested the issue of jurisdiction. The Virgin Islands statute[7] was not limited to servicemen, and the required period of presence was only six weeks as opposed to one year under the Texas statute but, nevertheless, the principle of that decision might be extended to the Texas statute. Servicemen's divorce statutes similar to the Texas act have been upheld by the courts of every state where they have been tested on federal constitutional grounds[8] but have not been considered by a federal court on the issues of either full faith and credit or internal validity.[9]

The wording of the Texas statute could have received one of two constructions, either (1) that the requirement of domicil is entirely *removed* or (2) that one year's residence in the state raises a *presumption* of domicil. In the recent case of *Wood v. Wood*,[10] the Texas Supreme Court followed the former interpretation and held that the state has an interest in the marital relations of servicemen who have been stationed in the state over one year sufficient to form a jurisdictional basis for a divorce decree.

It is the purpose of this Comment to examine generally the jurisdictional bases for divorce actions, the internal validity of such decrees, and their entitlement to full faith and credit. Emphasis will be placed upon the consideration of servicemen's divorces, including problems peculiar to securing this type of divorce and means of relieving those peculiar difficulties by specially designed statutes. Recent developments will be discussed, and an analysis of the Texas act's compliance with the requirements of full faith and credit will be attempted.

II. Problems Peculiar To Divorce Proceedings

A. *Generally*

Certain problems present themselves in divorce actions which are nonexistent in other cases.[11] These problems arise from the conflicting

[7] Virgin Islands Divorce Law § 9.

[8] Craig v. Craig, 143 Kan. 636, 56 P.2d 464 (1936); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954); Wood v. Wood, —Tex.—, 320 S.W.2d 807 (1959) (see casenote on this case in this issue of the Journal). The Georgia statute was held to violate a technical provision of the state constitution. Darbie v. Darbie, 195 Ga. 769, 25 S.E.2d 685 (1943).

[9] See Wood v. Wood, —Tex.—, 320 S.W.2d 807, 810 (1959).

[10] —Tex.—, 320 S.W.2d 807 (1959).

[11] Johnson v. Muelberger, 340 U.S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948) (dissent by Mr. Justice Frankfurter); Williams v. North Carolina (I), 317 U.S. 287 (1942).

interests involved. On the one hand, a state is said to have an interest in controlling the marital status of its citizens in order to preserve the sanctity of marriage and protect interests and obligations created thereunder; that is, public policy compels the treatment of the marital relationship as something more than a mere two-party contract revocable at will by the spouses.[12] On the other hand, there is the need for a realistic approach permitting individuals a reasonable opportunity to dissolve their marriage legally with the outcome certain. Certainty is necessary, of course, because of the serious and far-reaching consequences of a decree which lacks either internal validity or recognition in other states. For example, property rights following the death of one party may be altered after many years of a successful second marriage,[13] or the parties may remarry later and find themselves prosecuted for bigamy.[14]

A typical example of the manner in which these two interests may conflict is afforded by the situation in which a wife from New York, where a divorce can be obtained only on the ground of adultery,[15] goes to Florida for three months and in a Florida court alleges her intent to remain in Florida permanently. Her divorce may then be granted on the ground of "habitual indulgence by defendant in violent and ungovernable temper,"[16] whereupon she promptly returns to New York. Thus, New York is deprived of its control over the marital relations of its citizens by this temporary sojourn and its policy that divorce should be granted only for adultery is easily circumvented. The only protection that it has against such obvious flouting of its laws is the requirement that the plaintiff live in Florida for ninety days and swear that she intends to remain there.[17] The possibility of prosecution for perjury, which generally operates to discourage untruthfulness on the part of litigants, is virtually nonexistent here because there is little or no evidence which can disprove the plaintiff's declared state of mind.[18] Proof of

[12] See cases cited note 11 supra; Alton v. Alton, 207 F.2d 667, 673 (3d Cir. 1953); 17 Am. Jur. Divorce and Separation §§ 12-13 (1957).

[13] Rice v. Rice, 336 U.S. 674 (1949).

[14] Williams v. North Carolina (II), 325 U.S. 226 (1945).

[15] N.Y. Dom. Rel. Law § 8 (Supp. 1957); Stumberg, Conflict of Laws 301 (1951).

[16] Fla. Stat. chs. 65.02, 65.04(5) (1957). Other examples of divorce forums providing relatively lenient grounds and short residence requirements are: Virgin Islands - 6 weeks - "incompatability of temperment"; Wyoming - 60 days - "vagrancy of husband," "indignities to other spouse rendering condition intolerable"; Nevada - 6 weeks - "extreme cruelty" or "habitual gross drunkenness." These grounds in themselves may not be unusually lenient; the leniency results from the apparent ease with which the courts have permitted the grounds to be established.

[17] Fla. Stat. ch. 65.02 (1957) (residence period is now 6 months).

[18] See Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955) (dissent); Williams v. North Carolina (II), 325 U.S. 226 (1945); see note 19 infra.

subsequent inconsistent acts would show no more than that the declared intent changed, and would be of little significance.[19] Even the moral obligation of truthfulness in so nebulous an area as "intent to remain" can be side-stepped easily by rationalization. An argument that the interest of New York is protected by the fact that a defendant can deny the allegation of domicil is met by the reality that in most cases divorces are not contested by the other spouse.[20] Moreover, the domiciliary state does not seem to have standing to enter the proceeding itself and raise the issue of domicil.[21]

B. *In Servicemen's Divorces*

In most states it is theoretically possible for a serviceman to establish domicil in his duty state,[22] but the proof required is often so difficult to muster that it is impossible for him to do so.[23] One such obstacle is the requirement in many states that the intent be supported by a showing that the person entered the state *by choice.*[24] Servicemen can make no such showing.[25] If the state in which a soldier is stationed requires a proof of domicil and he is unable to meet that proof, he must return to a state in which he will be able

[19] Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955). Generally if the complaintant satisfies the court that he had established the requisite domicil at the time suit was commenced, he may change his domicil while the case is pending without depriving the court of jurisdiction. Jackson v. Jackson, 201 Okla. 292, 205 P.2d 297 (1949); Williams v. Williams, 146 S.W.2d 1013 (Tex. Civ. App. 1941).

[20] Alton v. Alton, 207 F.2d 667, 672 (3d Cir. 1953). From 1887 to 1931 approximately 13% were contested. In some cases the only contest consisted of the filing of an answer. Following Sherrer v. Sherrer, 334 U.S. 343 (1948), there was a sharp increase in the number of divorces "contested," especially in the more lenient states.

[21] The state is sometimes referred to as a quasi party. Hopping v. Hopping, 233 Iowa 933, 10 N.W.2d 87 (1943). Generally, however, the state cannot become an actual party through the intervention of the attorney general, etc. Boykin v. Martocello, 194 Ga. 867, 22 S.E.2d 790 (1942); State ex rel. Fowler v. Moore, 46 Nev. 65, 207 Pac. 75 (1922).

[22] Walsh v. Walsh, 215 La. 1099, 42 So. 2d 860 (1949), cert. denied, 339 U.S. 914 (1950); Allen v. Allen, 52 N.M. 174, 194 P.2d 270 (1948); Robinson v. Robinson, 235 S.W.2d 228 (Tex. Civ. App. 1950); Dodd v. Dodd, 15 S.W.2d 686 (Tex. Civ. App. 1929).

[23] Postle v. Postle, 280 S.W.2d 633 (Tex. Civ. App. 1955); Green v. Green, 279 S.W.2d 395 (Tex. Civ. App. 1955); Klingler v. Klingler, 254 S.W.2d 817 (Tex. Civ. App. 1953). Texas requires proof of "clear and unequivocal intention" to make Texas a permanent home evidenced by overt acts, but does not adhere to the strict view that presence of the prospective domiciliary must have been by choice. Pippin v. Pippin, 193 S.W.2d 236 (Tex. Civ. App. 1946); Wilson v. Wilson, 189 S.W.2d 212 (Tex. Civ. App. 1945). Furthermore, if the serviceman is required by the government to live on the post, even though with his family, he is generally precluded from establishing domicil. Harris v. Harris, 205 Iowa 108, 215 N.W. 661 (1927); Zimmerman v. Zimmerman, 175 Ore. 585, 155 P.2d 293 (1945); Restatement, Conflict of Laws § 21 (1934).

[24] Zimmerman v. Zimmerman, 175 Ore. 585, 155 P.2d 293 (1945); Restatement, Conflict of Laws §§ 15, 21 (1934).

[25] Unless the requirement of "choice" is satisfied by "choosing" to live off the military base. Generally, however, the "choice" refers to entry into the state. Zimmerman v. Zimmerman, 175 Ore. 585, 155 P.2d 293 (1945).

to establish domicil to bring his suit for divorce.[26] For a career serviceman who has no "home" state, it may be difficult to find his state of domicil, and even after locating it he may be confronted with unreasonable expenditures of time and money in order to bring his suit in that state of which he is technically a domiciliary. Moreover, when the serviceman brings the action in his "home" state, he is sometimes required by that state to have been *present* within the state for a certain period immediately prior to filing the action.[27] In order to bring a divorce proceeding in such a state, it would be necessary for the serviceman to be discharged and return for the statutory period, unless he happened to be stationed there. It seems clear that some provision should be made for relieving this situation, particularly since in most cases the serviceman is involved in his plight involuntarily.

Even assuming that domicil is the proper basis for divorce actions generally, servicemen's divorces stand on different footings, and affording them treatment different from the ordinary can be justified. For one thing, the threat to the interest of the state of true domicil is not the same where soldiers are involved, because usually there is not the intentional circumvention of the laws of that state such as is found in "quickie" divorces open to anyone with sufficient money and leisure time. A person is unlikely to join the army in order to get a divorce, and one in the service would seldom let the thought of divorce influence his already limited voice in choosing a duty state.

Nevertheless, under a strict view that domicil is the *only* status creating an interest in the marriage sufficient to allow a state to dissolve it, a divorce granted to a soldier solely on the basis of his being stationed in a state for a year would not be entitled to full faith and credit.[28] The shocking result would be that in event of attack upon the decree in another state, the perjured allegation of domicil in the "quickie" divorce might require that it be extended full faith and credit, while a serviceman without any intent to circumvent the law of the so-called domiciliary state might find himself the object of bigamy prosecution because he did not allege domicil and, in fact, was not required to do so.[29] It seems unlikely that a state would prosecute a remarried serviceman on the ground that his prior divorce is invalid because he failed to allege domicil, but it is quite possible

[26] Lawrence v. Lawrence, 184 Misc. 515, 53 N.Y.S.2d 288 (1945); Lewis v. Lewis, 224 S.W.2d 277 (Tex. Civ. App. 1949).

[27] Marshall v. Marshall, 130 Conn. 655, 36 A.2d 743 (1944); Hiles v. Hiles, 164 Va. 131, 178 S.E. 913 (1935).

[28] See authorities cited note 2 supra.

[29] Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1957); see Williams v. North Carolina (II), 325 U.S. 226 (1945).

that the children of such a dissolved marriage might successfully urge the invalidity of the dissolution for the purpose of claiming property left by the death of the soldier parent.[30]

Where servicemen are involved, a need exists for reappraising the balance between the interest of the state in preserving marriages and the right of an individual to have his marriage dissolved legally with the outcome certain.

III. Historical Background

As previously stated, the requirement of domicil as a basis of jurisdiction arises from the nature of the marital relationship.[31] It is more than a mere two-party contract; it is a status in which the state has an interest arising from its right to control the welfare and morals of its citizens. The "citizens" over which this control is exercised are those who have sufficient permanence to consider the state their home, and the term used to describe this relationship is "domicil." Domicil is not terminated by long periods of absence; it ends only upon aquisition of a new domicil.[32] This interest of the state continues so long as domicil exists.

The nature of a divorce proceeding is generally said to be in rem on the theory that it is an action against the status of marriage.[33] This was the view taken by early decisions and seems applicable today[34] although there is a period in which divorce actions were held to be in personam.[35] The latter view arose in the case of *Haddock v. Haddock*.[36] The plaintiff husband was domiciled in Connecticut and his wife in New York. Connecticut granted him an ex parte divorce (*i.e.*, one in which the defendant neither appeared nor was cited in Connecticut) which the New York court held was no defense to an action by the wife for nonsupport. The United States Supreme Court affirmed, holding that when a divorce action is maintained in a state which is *not* the matrimonial domicil and which is the domicil only of the complaining spouse, the respondent must be

[30] See Johnson v. Muelberger, 340 U.S. 581 (1951).

[31] See cases cited note 11 supra.

[32] Restatement, Conflict of Laws §§ 18, 23 (1934).

[33] 2 Bishop, Marriage and Divorce § 164 (4th ed. 1891); Stumberg, Conflict of Laws 296 (2d ed. 1951).

[34] Williams v. North Carolina (I), 317 U.S. 287 (1942); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953); Ditson v. Ditson, 4 R.I. 87 (1856).

[35] In Haddock v. Haddock, 201 U.S. 562 (1906), the Court said at 572: "In other words, the final question is whether to enforce in another jurisdiction the Connecticut decree would not be to enforce in one state, a personal judgment rendered in another state against a defendant over whom the court of the state rendering the judgment had not acquired jurisdiction."

[36] Haddock v. Haddock, supra note 35.

served locally or appear in order for the decree to be entitled to full faith and credit. The exact meaning of this holding is uncertain. It could imply (1) that jurisdiction over the "res" is unimportant when there is personal jurisdiction over the parties, (2) that *both* parties must be present before the *res* can be present (although this seems to violate the concept previously recognized by that same Court that the power to divorce grows out of domicil, which in turn arises from permanence and is not affected by mere physical presence), or (3) that jurisdiction of the *res* is necessary and is gained by domicil of only one spouse, but a divorce action nevertheless is sufficiently in personam to require the presence of both parties. Although it held the decree was not entitled to full faith and credit, the Court indicated that it was valid in Connecticut, where the plaintiff was domiciled, because that state had power to determine the status of its citizens although that determination might not be binding on an absent spouse.[37] It is clear that there was no departure from the requirement of domicil. The significance of the decision probably has been greatly confused by the many conflicting interpretations which have been attempted. For the purposes of this Comment, it is sufficient to assume that its significance was merely that ex parte divorce decrees granted in the domicil of one spouse which is not the matrimonial domicil are not entitled to full faith and credit.

The *Haddock* decision was overruled in the first case of *Williams v. North Carolina.*[38] In that case the husband left North Carolina and went to Nevada where he remained six weeks and then brought an ex parte divorce action in which he alleged domicil. The Nevada court found domicil to exist and granted the divorce. The state of North Carolina later prosecuted the husband for bigamy following his marriage to another person and subsequent return to North Carolina.[39] The United States Supreme Court reversed the conviction, holding that the change in status of the husband, who was according to Nevada Law a domiciliary of that state at the time of his divorce, was equally binding on the wife although she neither appeared nor was served personally. This holding implies a return to the in rem theory, for if an ex parte decree binds a spouse who was never in the state of the forum and did not consent to the jurisdiction, it seems it must be on the ground that the action is against a *res* present within the forum.

[37] Id. at 605.
[38] 317 U.S. 287 (1942).
[39] State v. Williams, 220 N.C. 445, 17 S.E.2d 769 (1941).

While the in rem analogy may aid in understanding both the *nature* of the domiciliary state's interest and some of the theories based on that interest which support the *requirement* of domicil, it is of little value in determining *which* state has that interest and whether or not a divorce decree based on it should be recognized in other states. This is so because the *res* of a marriage is elusive, intangible, and defiant of spatial limitations. For example, where the parties live together and maintain a home it is easy to think of the relationship as a *res*. However, if the spouses leave this state and each establishes a separate domicil, it is difficult to regard the relationship as a *res* and even more difficult to determine its location. It could be argued that there is no longer a *res*, on the theory that it can have no existence without a community of interest and activities, and that it perishes when this sort of marital relationship is not actively maintained; each of the separated parties retains his "status" as a *married person*, but there appears to be nothing worthy of designation as the *res* of the *marriage itself*. If the *res* is regarded as continuing to exist, it must be "located" in two states, both of which should have jurisdiction over it. It appears more accurate simply to say that a state has an interest in the domestic relations of its residents and that from this interest comes the power to alter those relations, and that because the action by which those relations are altered is not *purely* in personam, the judgment must be given full faith and credit by sister states.[40]

IV. Validity Within the Forum

Problems involving jurisdiction to grant divorce decrees arise in two areas: the internal validity (*i.e.*, the power to grant)[41] and the entitlement to full faith and credit.[42] This section concerns the internal validity. As stated above, numerous attempts have been made to change the traditional requirement of domicil by means of legislation.[43] These attempts fall into three categories. *First*, there are those statutes *dispensing with domicil* and not requiring any substantial interest in the divorcing state. One example is a statute providing that appearance by both parties confers jurisdiction.[44]

[40] Williams v. North Carolina (I), 317 U.S. 287, 297 (1942).

[41] Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953); Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

[42] Williams v. North Carolina (II), 325 U.S. 226 (1945); Williams v. North Carolina (I), 317 U.S. 287 (1942).

[43] Tex. Rev. Civ. Stat. Ann. art. 4631 (Supp. 1958); see statutes cited note 5 supra; Ala. Code tit. 34, § 29 (Supp. 1945); see statutes cited note 45 infra; Virgin Islands Divorce Law § 9 (1953); N.Y. Civ. Prac. Act § 1147 (Supp. 1957).

[44] Ala. Code tit. 34, § 29 (Supp. 1945), declared invalid in Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

Another example is a statute giving jurisdiction based on a relatively short period of residence, *e.g.*, three months.[45] This latter type requires *some* interest, viz., the period of presence, but it is felt that such an interest is not substantial, although probably there is a point at which mere presence would become substantial. One year, for example, might be substantial. The *second* type of statute includes those making certain facts (such as six weeks' continuous residence within the state) prima facie *evidence of domicil.*[46] The *third* group is composed of statutes requiring a *substantial interest* based upon something *other than domicil.* This type is illustrated by the servicemen's divorce statutes conferring jurisdiction based on the interest of the state in the marital relations of servicemen stationed there for at least a year.[47] Another illustration is a New York statute conferring jurisdiction upon its courts to terminate any marriage consummated within that state regardless of the domicil of the parties at the time of the divorce action.[48] Here the interest of New York in marriages performed under its laws is substituted for an interest based on domicil.

Generally, statutes of the first and third types have received opposite treatment by courts. Those of type three have been upheld in every state court in which their validity has been tested, and in several cases courts expressed by dicta the belief that decrees granted under this type of statute would be entitled to full faith and credit.[49] On the other hand, statutes of type one generally have been held invalid (*i.e.*, that they failed to confer the power to grant even an internally valid divorce).[50] A notable exception is the recent Arkansas Supreme Court case, *Wheat v. Wheat.*[51] Statutes of the second type have not been given a fair determination because those that have been construed make a very short period of presence the fact from which domicil is to be presumed, and thus leave little rational connection between the presumption and the fact on which it is based.[52] As discussed later, the general rule that a rational connection

[45] Ark. Stat. § 34-1208 (Supp. 1949), upheld in Wheat v. Wheat, —Ark.—, 318 S.W.2d 793 (1958). Examples of statutory departures from domicil conferring jurisdiction based on the *grounds* for the divorce: Colo. Rev. Stat. Ann. § 46-1-3 (1953) (adultery or extreme cruelty); Minn. Stat. Ann. § 518.07 (1945) (adultery).

[46] Virgin Islands Divorce Law § 9 (1953), declared invalid in Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

[47] See statutes cited in notes 1 and 5 supra.

[48] N. Y. Civ. Prac. Act § 1147 (Supp. 1957), upheld in David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S.2d 649 (1954).

[49] Supra note 8; David-Zieseniss v. Zieseniss, supra note 48.

[50] See cases cited supra note 41.

[51] —Ark.—, 318 S.W.2d 793 (1958); see note 69 infra and accompanying text.

[52] Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955); Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

is necessary only when the presumption is conclusive (and thus a rule of substantive law)[53] logically does not apply in the area of divorce because most cases are uncontested and the presumption is not likely to be rebutted. Therefore, in divorce actions even a rebuttable presumption must have a rational connection with the underlying fact.[54]

The precise grounds on which various statutes have been held invalid are difficult to determine because the language used by the courts is often vague and very general. Examination of a few cases will illustrate the state of the law in this area. Two significant cases have arisen under the following Virgin Islands statute which provides:

> If the plaintiff is within the district at the time of the filing of the complaint and has been continuously for six weeks immediately prior thereto, this shall be prima facie evidence of domicile and where the defendant has been personally served within the district or enters a general appearance on the action, then the court shall have jurisdiction of the action and of the parties thereto without further reference to domicil or to the place where the marriage was solemnized or the cause of action arose.[55]

Mrs. Alton, a resident of Connecticut, went to the Virgin Islands and after six weeks' presence filed suit for divorce under the above statute. Her husband entered a general appearance through counsel and did not contest the divorce. The district court[56] on its own motion required Mrs. Alton to furnish evidence of domicil and upon her failure to do so dismissed the action. The Third Circuit[57] upheld the action of the district court upon the ground that the granting of a divorce in a state in which neither spouse was domiciled would "conflict with the due process clause." The court said:

> Our conclusion is that the second part of the statute conflicts with the due process clause of the Fifth Amendment. . . . An attempt by another jurisdiction to affect the relation of a foreign domiciliary is unconstitutional even though both parties are in court and neither one raises the question. The question may well be asked as to what the lack of due process is. The defendant is not complaining. Nevertheless, if the jurisdiction for divorce continues to be based on domicile, as we think it does, we believe it to be a lack of due process for one state

[53] Alton v. Alton, 207 F.2d 667, 671 (3d Cir. 1953); 1 McCormick and Ray, Texas Evidence § 58 (2d ed. 1956).

[54] See cases cited supra note 52.

[55] Virgin Islands Divorce Law § 9 (1953).

[56] 121 F. Supp. 878 (D.V.I. 1953).

[57] Alton v. Alton, 207 F.2d 667 (3d Cir. 1953), dismissed as moot in 347 U.S. 610 (1954).

> to take to itself the readjustment of domestic relations between those domiciled elsewhere. The Supreme Court has in a number of cases used the due process clause to correct states which have passed beyond what that court has considered proper choice-of-laws rules.[58]

The dissent in that case said:

> . . . this court now says that the fifth amendment requires that the exercise of legal power to grant divorce be restricted to these cases where one party at least is a local domiciliary. The agreed starting point . . . is the fact that English and American judges in recent times have refrained, in the absence of statute, from exercising their divorce power except in cases involving local domiciliaries. But what is it that raises this judicial rule of self-restraint to the status of an invariable Constitutional principle?[59]

The dissent then examined the history of divorce jurisdiction and concluded that the requirement of domicil is a judge-made rule and that the proper test is whether or not "it is clearly arbitrary or unfair for a legislature to adopt an alternative for domicil as an appropriate foundation for divorce power."

The case is criticized by Professor Rheinstein:[60]

> Neither the clause of the 5th Amendment nor that of the 14th is of any relevance unless it can be said that some person has been, or would be, deprived of life, liberty or property without due process of law. But who could allege to have suffered such a deprivation by consequence of a decree of divorce rendered in consonance with . . . the divorce act of the Virgin Islands? Certainly not the plaintiff. . . . And the defendant? By entering a general appearance and choosing not to defend he has at least signified his acquiescence. Who, we may ask, has been deprived of life, liberty or property without due process of law?[61]

The *Alton* case is significant also because of the construction given the first part of the statute, which made six weeks' presence prima facie evidence of domicil. The court held that the prima facie presumption, even though rebuttable, in effect did away with a requirement of domicil because as a practical matter, since most divorces are not contested, the presumption would seldom be rebutted. On this point the dissent argued that the requirement of domicil is not removed by this provision and that the presumption is valid because there is a "substantial rational connection" between six weeks' presence and domicil.

In *Granville-Smith v. Granville-Smith*,[62] in which the facts were

[58] Id. at 677.
[59] Id. at 681.
[60] Rheinstein, The Constitutional Bases of Jurisdiction, 22 U. Chi. L. Rev. 775 (1955).
[61] Id. at 779.
[62] 349 U.S. 1 (1955).

essentially the same as in the *Alton* case, the United States Supreme Court had an opportunity to pass on the power of a state to grant a divorce decree internally valid on a jurisdictional basis other than domicil. However, the Court found the Virgin Islands statute invalid on other grounds by holding that the Virgin Islands lacked power to legislate except with regard to "subjects of local character" and that this divorce was aimed at tourist divorces, not local ones. In a dissenting opinion, Mr. Justice Clark, joined by Justices Black and Reed, criticized the majority for failing to meet the question presented and argued for the validity of such a statute on the ground that domicil is an outmoded, judge-made rule. He stated that due process had no relevance because "neither of the Granville-Smiths claims to have been deprived of life, liberty or property without due process of law. While the state has an interest in the marital relationship, certainly this interest does not come within the protection of the due process clause."[63] He concluded his dissent by saying: "The only vice of the Virgin Islands' statute, in an uncontested case like this, is that it makes unnecessary a choice between bigamy and perjury."[64]

The *Alton* and *Granville-Smith* cases were decided in federal courts. In *Jennings v. Jennings*,[65] the Alabama Supreme Court declared invalid an amendment to the Alabama divorce laws, which provided: ". . . the provisions of this section [requiring domicil] shall not be of force and effect when the court has jurisdiction of both parties to the cause of action."[66] In holding the statute invalid the court said that ". . . the legislature of a state cannot confer on the courts of that state a power which is not within the power of the state to confer on the legislature."[67] Elsewhere, the opinion emphasized the necessity of gaining jurisdiction over the *res* and of avoiding invasion of another state's sovereignty. There was considerable discussion of full faith and credit and, although the court stated that the decision did not rest on that clause, one cannot escape the feeling that the court was influenced by its belief that such judgments would not be recognized elsewhere. It must be remembered that in effect this statute attempted to confer "consent" jurisdiction and cerainly would stand on much weaker ground than the Virgin Islands or Arkansas statutes, which do have some reasonable basis for jurisdiction, namely, presence of at least one party for a cer-

[63] Id. at 26.
[64] Id. at 28.
[65] 251 Ala. 73, 36 So. 2d 236 (1948).
[66] Ala. Code tit. 34, § 29 (Supp. 1945).
[67] Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

tain period of time. The conferring of consent jurisdiction seems at least as far removed from conferring jurisdiction on the basis of three months' presence as the latter is from conferring jurisdiction on the basis of technical domicil.

In 1957 Arkansas passed a statute providing: "The word 'resident' as used in Section 34-1208 [which required three months' residence for jurisdiction in divorce action] is defined to mean actual presence and upon proof of such the party alleging and offering such proof shall be considered domiciled in the state. . . ."[68] Thus, physical presence for three months was substituted for domicil. In the case of *Wheat v. Wheat*,[69] the plaintiff rented and lived in an apartment in West Memphis, Arkansas, just across the border from his place of daily employment in Tennessee. After three months he filed suit for divorce. His wife, who was a resident of California, denied the jurisdiction of the Arkansas court, but filed a cross claim asking for separate maintenance. The Arkansas Supreme Court upheld the statute although it expressed doubt as to the external recognition of divorces granted thereunder. The opinion stated that "with respect to the due process clause, as distinguished from the full faith and credit clause, we are not convinced that domicil must be the sole basis for the exercise of jurisdiction over the marriage relationship."[70] The court distinguished the *Jennings* case on the ground that ". . . there was no reasonable basis for the exercise of jurisdiction over the marital status by the Alabama court."[71] The court conceded that if the period of residence were made *too* short the state would have no reasonable basis for exercising jurisdiction over the marriage.

V. Recognition In Other States

Thorough treatment of the complex problems involved in determining under what circumstances a divorce decree can be attacked in other jurisdictions is beyond the scope of this Comment. However, it is felt that some discussion pointing out the problems which arise will enable the reader better to understand the importance of jurisdiction and to become aware of the results which may follow failure to confer jurisdiction. The law in this area is unsettled, and an examination of the cases reveals that much of the confusion may be due to the inadequacy of domicil as the sole basis of jurisdiction.

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[68] Ark. Stat. § 34-1208.1 (1947).
[69] Wheat v. Wheat, —Ark.—, 318 S.W.2d 793 (1958).
[70] Id. at 797.
[71] Ibid.

The second *Williams* case[72] followed the Supreme Court's reversal of the first decision, which had held that an ex parte decree based on domicil of the plaintiff husband was entitled to full faith and credit in other states. In the second case, the North Carolina court found that in fact the husband had not been domiciled in Nevada and that therefore the decree was rendered without jurisdiction and thus not entitled to full faith and credit.[73] This time the United States Supreme Court upheld the conviction, saying that where the defendant spouse neither appeared nor was personally served in the forum (*i.e.*, when the divorce is ex parte), the finding of domicil can be attacked in another state. This decision allowing a finding of domicil to be attacked in a court of another state created considerable uncertainty as to the finality of divorce decrees in general. This uncertainty was eased to some extent by subsequent cases. In *Sherrer v. Sherrer*,[74] the wife left her Massachusetts home, went to Florida for the required ninety days, and brought divorce proceedings in which she alleged domicil. Her husband appeared and denied the existence of a Florida domicil, but the court found in favor of the wife and granted the divorce. The "wife" then remarried and returned to Massachusetts. The former husband later attacked the Florida decree in a Massachusetts court. It was found that the wife had not been domiciled in Florida at the time of the divorce, and on this ground the Massachusetts court refused to extend the Florida decree full faith and credit.[75] In reversing the Massachusetts court, the United States Supreme Court said that the appearance of the husband made the finding of domicil *res judicata* and entitled the Florida decree to full faith and credit in Massachusetts. In a dissenting opinion Mr. Justice Frankfurter urged that rules of *res judicata* different from those applied to other "litigants" should be applied to the parties in divorce proceedings. He considered such a distinction necessary in order to safeguard the interest of the state of true domicil (considering the repeated invasion of its divorce laws) because most divorces are not contested by the defendant spouse, and that interest is thus left without protection. The Supreme Court also has indicated that personal service in the forum without appearance would be sufficient to preclude attack by the cited spouse and that the out-of-state decree would be en-

[72] Williams v. North Carolina (II), 325 U.S. 226 (1945).
[73] State v. Williams, 224 N.C. 183, 29 S.E.2d 744 (1944).
[74] 334 U.S. 343 (1948).
[75] 320 Mass. 51, 69 N.E.2d 801 (1946).

titled to full faith and credit.[76] Thus, it seems that a spouse who is personally cited or who appears, whether or not he contests the allegation of domicil, is barred from attacking the divorce decree in any state. On the other hand, if the divorce was ex parte he is not barred from attacking it.

The foregoing cases concerned attacks by spouses who were parties to the divorce actions. When the external validity is challenged by a "stranger" to the divorce under circumstances in which a spouse would be precluded from attacking, the result is less certain. This uncertainty arises from the different degrees of "stranger" and the variety of purposes for which the attack may be made. For example, the stranger may be someone who aided in the conferring of jurisdiction through a fraudulent allegation of domicil, or he may be an innocent child of the dissolved marriage. The purpose of the assault may be the destruction of a subsequent marriage which is otherwise valid, or the protection of property rights established under the dissolved marriage. In the case of *Cook v. Cook*,[77] the wife was living with her second husband when she discovered she was still married to her first husband. At the suggestion and expense of her second husband she went to Florida, remained ninety days, alleged domicil, and secured a divorce. While the record did not disclose whether or not the first husband appeared or was served, the Court assumes for the purpose of the decision that he either appeared or was served in the forum. The "wife" returned to her home and remarried the second husband. This second husband later sought to have the wife's marriage to him declared void on the ground that she was still married to her first husband at the time of the second marriage since she was not in fact domiciled in Florida when she was granted a divorce in that state. The Supreme Court held that the second husband could not attack the finding of domicil, although he had not been a party to the divorce. "If the defendant spouse appeared in the Florida proceeding and contested the issue of the wife's domicil . . . or appeared and admitted her Florida domicil . . . or was personally served in the divorce state . . . , he would be barred from attacking the decree collaterally; and so would a stranger such as respondent, unless Florida applies a less strict rule of res judicata to the second husband than it does to the first."[78] The decision does not state clearly the basis for precluding the attack, but underlying the application

[76] Johnson v. Muelberger, 340 U. S. 581 (1951); Sherrer v. Sherrer, 334 U.S. 343 (1948).
[77] 342 U.S. 126 (1951).
[78] Id. at 127.

of res judicata to him must have been the view that he was in "privity" with the parties and bound as they were. Since the stranger had participated in the scheme and was attempting to use the lack of domicil to escape the obligations of a marriage he entered with full knowledge that the wife was not domiciled in Florida, it seems that the Court could have applied the simpler rule of estoppel rather than res judicata. In *Johnson v. Muelburger,*[79] the husband's second wife obtained a Florida divorce, and the husband then married a third wife. After his death, his daughter by the first marriage sought to have the Florida divorce from the second wife declared void so as to void his third marriage and thus prevent the third wife from taking a statutory share of his estate. The United States Supreme Court found that under Florida law a child cannot attack a divorce decree for lack of jurisdiction if the parent cannot do so, and therefore held that the full faith and credit clause precluded attack by the child in New York. Mr. Justice Frankfurter dissented on the ground that the child was a stranger and that the full faith and credit clause does not prevent a stranger from attacking the decree, according to the principles expressed in *Sherrer v. Sherrer.*[80] This decision indicates a strong tendency not to allow a finding of domicil to be challenged when both spouses appeared in the original divorce proceedings. This tendency appears stronger than it appeared in the *Cook* case, because in that case the stranger participated in the scheme, while in the instant case the attack was made by a daughter who was apparently free of any involvement in the first divorce.

The question of whether a *state* can attack a decree under circumstances in which the parties would be barred has not been answered by the United States Supreme Court. Several decisions strongly imply that where the defendant spouse appears or is cited in the forum, attack by a foreign state is precluded just as was the attack by the daughter in *Johnson v. Muelberger.*[81] However, there seems to be a clear distinction between challenge by a state and by a child of one of the spouses. Although not a party to the scheme, the child can be barred under the theory that he was in privity with the parties, but with regard to a state even that tenuous reasoning cannot conceivably be applied. Also, the domiciliary state probably can rely at least to some extent on its unique interest in the marriage

[79] 340 U.S. 581 (1951).
[80] 334 U.S. 343 (1948).
[81] Johnson v. Muelberger, 340 U.S. 581 (1951); Williams v. North Carolina (I), 317 U.S. 287 (1942).

and, furthermore, a state traditionally cannot be estopped.[82] How much significance will be attached to these differences remains to be seen, because the courts so far have not been explicit in indicating the factors precluding attack.

VI. Servicemen's Divorce Statutes

A. *In Other States*

The cases previously discussed generally involved "migratory" divorces, *i.e.*, those obtained by persons who voluntarily left their states of domicil in search of easy divorces. Most of the statutes making such actions possible attempt to transform suits for divorce from in rem or quasi in rem to in personam actions, with the result that jurisdiction is often conferred by presence alone. By way of contrast, servicemen's divorce statutes are different in both legal theory and practical effects, for they do not convert the nature of the suit to in personam, and therefore do not have the effect of conferring jurisdiction on the basis of mere physical presence, so that their ultimate effect does not encourage easy divorces. As will be seen, the various statutes permitting servicemen to maintain divorce actions in the states in which they are stationed uniformly require a substantial interest in the divorcing state, the shortest period of residence required being six months[83] and the longest being twelve months.[84] While the statutes, of course, make no reference to the possibility of their being used to defeat the legitimate interests of domiciliary states, there is implied recognition of the fact that it would be difficult under this statute for a serviceman to manipulate his affairs so as to circumvent the divorce laws of his home state.

One of the earliest servicemen's divorce statutes was a 1933 amendment to the divorce law of Kansas permitting any person assigned to a military reservation in the state for one year to bring an action for divorce.[85] Its validity was upheld by the Kansas Supreme Court in 1936.[86] The court interpreted the statute not as making a year's residence prima facie evidence of domicil, but as *removing* the necessity of domicil for servicemen. There was no discussion of the act's possible unconstitutionality under the due pro-

[82] See Arkansas v. Tennessee, 246 U.S. 158 (1918); Fowler v. Lindsey, 3 Dall. 411 (1799).

[83] Okla. Stat. tit. 12, § 2 (1957).

[84] All servicemen's divorce statutes other than the Oklahoma statute require one year's residence; see note 5 supra.

[85] Kan. Gen. Stat. Ann. § 60-1502 (1949).

[86] Craig v. Craig, 143 Kan. 636, 56 P.2d 464 (1936).

cess clause or lack of entitlement to full faith and credit due to the absence of domicil. In 1943, the Florida Supreme Court upheld a similar statute providing that a serviceman stationed in the state should be deemed prima facie to be a resident for the purpose of maintaining "any suit."[87] Again, the court did not discuss the question of constitutionality or of full faith and credit.

In 1951, New Mexico passed a statute similar to the Texas act.[88] It provides that "servicemen continuously stationed in New Mexico for one year shall, for purposes of instituting divorce proceedings, be deemed residents in good faith." Two of the cases (decided by the highest court of that state) upholding the provision offer persuasive arguments supporting the validity within the forum of this type of statute and divorces granted thereunder, as well as their recognition in other states. In *Crownover v. Crownover*,[89] the statute was interpreted as raising a conclusive presumption of domicil, which was held not to be an unconstitutional provision because there is a rational connection between one year's presence (even in the service) and domiciliary intent. In *Wallace v. Wallace*,[90] decided in 1958, the court's opinion met squarely the problem of domicil. First it recognized that the *Crownover* holding amounted to a repudiation of the theory that domicil is the only possible jurisdictional basis for divorce. It defended the rejection of domicil, pointing out the basic purpose for that requirement (viz., public policy) and stating that this purpose might be served equally well by the New Mexico statute omitting the requirement of domicil. Furthermore, attention was called to the fact that most decisions holding domicil to be a jurisdictional necessity were rendered in cases where it had been expressly made so by state statutes.

B. *In Texas*

In *Wood v. Wood*,[91] decided by the Texas Supreme Court January 28, 1959, the validity of the Texas statute was upheld. A serviceman stationed in Wichita Falls brought an action for divorce. Neither he nor his wife was domiciled in Texas. The wife appeared and urged that the statute was invalid on three grounds: (1) that domicil is an indispensable requisite to divorce jurisdiction; (2) that she was denied equal protection of the laws because the statute did not provide for allowing the *wife* of a serviceman to bring an action

[87] Mills v. Mills, 153 Fla. 746, 15 So. 2d 763 (1943).
[88] N.M. Stat. Ann. § 22-7-4 (1953).
[89] 58 N.M. 597, 274 P.2d 127 (1954).
[90] 63 N.M. 414, 320 P.2d 1020 (1958).
[91] —Tex.—, 320 S.W.2d 807 (1959).

for divorce; and (3) that the statute was "special legislation." In answering the first argument, the Court pointed out that a requirement of domicil as a requisite to jurisdiction would be applicable only to the question of full faith and credit, and the United States Supreme Court has never held that a divorce decree has no internal validity because not entitled to full faith and credit. Thus, the state of Texas has the right to determine by statute who is entitled to maintain actions for divorce within the state, and this right is not affected by the full faith and credit clause. After expressing that the question being decided, viz., internal validity, is in no way affected by external validity, the Court presented strong arguments in support of the statute as creating divorces valid externally as well as internally. The Court reviewed the wisdom of servicemen's statutes from a public policy standpoint, distinguishing them from undesirable migratory divorce statutes. The interest of the state in the marital relations of servicemen stationed there was found to be substantial enough to satisfy the public policy objections which domicil traditionally has overcome. Hence, even if statutes designed to favor migratory divorces are contrary to public policy and therefore invalid even within the forum, it does not follow that domicil is the *sine qua non* of jurisdiction. The Court observed: "Texas is hardly less concerned with the domestic relations of persons required to live in the state indefinitely under military orders, often for a period of years . . . , than of those who have acquired a domicil here in the orthodox sense."[92]

The Court interpreted the cases of *Williams v. North Carolina*[93] as requiring domicil not as a requisite to full faith and credit imposed by the Constitution, but as a requirement of the state of Nevada; if domicil is required by the forum, then it is of course necessary for validity within the forum as well as for full faith and credit elsewhere. Unlike Nevada, Texas does not require domicil for internal validity. It does, however, require a substantial interest which appears sufficient to satisfy the requirement of jurisdiction in the conflict-of-laws sense. Thus, the Court observed: "We entertain little doubt but that a divorce judgment rendered in conformity with this amendment will be recognized elsewhere."[94] The second contention of the wife, viz., that the statute was a denial of equal protection because by its own terms it applied only to "*servicemen*," the Court disposed of by interpreting the statute as extending to the *wives*

[92] Id. at 811.
[93] 325 U.S. 226 (1945); 317 U.S. 287 (1942).
[94] Wood v. Wood, —Tex.—, 320 S.W.2d 807, 811 (1959).

of servicemen the same rights given to the servicemen.[95] The third objection was dismissed by concluding that the statute is not special legislation, since it is of general public concern and applicable to all servicemen.

VII. Conclusion

On the basis of the foregoing discussion, the writer has reached the following conclusions: (A) that the requirement of one year's presence in the forum is preferable to the requirement of technical domicil as a basis for jurisdiction in servicemen's divorces; (B) that the courts should recognize a distinction between the validity of a divorce decree within the forum and its recognition elsewhere; and (C) that a receptive attitude has developed toward the acceptance of a substantial interest other than domicil as a basis for jurisdiction in divorce actions.

A. *Relative Merits of the One-Year's-Presence Rule*

1. *Under the In Rem Analogy*

Under the in rem analogy of divorce actions, the purpose in requiring domicil is to assure the court that the *res* of the marriage is present in the state in which the divorce is sought. While the cases contain no general definition of the *res,* logically it must consist of the community of activities and interests which accompany the active maintenance of a marital relationship. If the *res* is thus defined, it is apparent that the *res* may or may not accompany domicil.[96] Thus, since the requirement of domicil sometimes fails

[95] Presumably this means that if the wife has lived in Texas with her serviceman husband for one year she can bring an action for divorce although domiciled elsewhere. The Court justified this interpretation by *analogy* to the general rule that the domicil of the wife follows that of the husband when they live together. The basis for applying this analogy is uncertain, but the Court seemed to reason that when domicil is the basis for jurisdiction and the parties live together, the thing upon which jurisdiction is based, viz., domicil, follows the husband. In the present statute the basis has been changed from domicil to a "year's presence while in the armed forces," but the legislature may have intended not to change the "rule" that divorce jurisdiction for the wife, whatever the basis, follows that of the husband. A slightly different line of reasoning may have led the Court to feel that since a wife living with her husband can bring suit for divorce in the same forum as her husband, the legislature intended to continue allowing her to do so although domicil is no longer the basis. Under either interpretation the analogy is tenuous, and the Court is merely filling a gap left by the legislature. The second line of reasoning is particularly unsound because it is the fact of the wife's *domicil* which allows her to bring a divorce action in a particular state, not the fact that her husband can bring an action in that state. Nevertheless, the result seems desirable because a wife is faced with the same hardships in complying with a requirement of technical domicil as is the husband, and certainly the interest of the state in which they are living is the same for the wife as for the husband. In fact, the interest of the state should be in the *marriage,* not merely in the parties as individuals.

[96] See note 40 supra and accompanying text.

to accomplish its purpose of bringing the *res* within the forum, an alternative rule should not be criticized on the ground that it is less than perfect. It should be sufficient that the alternative basis shows promise of serving equally as well in most cases and better in many. Therefore, the writer believes that with reference to servicemen's divorces the alternative rule of one year's presence adopted by the Texas servicemen's divorce act is clearly acceptable as a basis for jurisdiction, for domicil is a "rule of thumb" based on the probability that wherever it is, the *res* of the marriage also will be. The requirement of one year's presence is based on a similar probability, and it is more likely that the *res* is present in Texas after a year's residence than that in some unexplained manner it inadvertently has been "left behind" in the state of technical domicil. For example, assume that a serviceman stationed in Texas lives off the military base with his wife and children. The children attend public schools, the family belongs to a local church, and to all appearances the members of the family have become members of the community. In this situation it seems clear that Texas is the situs of the *res*, rather than the state of technical domicil from which the family has been absent for several years.

2. *Under the "Quasi In Rem" Theory*

Admittedly, when the marriage relationship is not actively maintained, the in rem analogy becomes tenuous since there appears to be no marital *res* in existence.[97] A suit for divorce under these circumstances more nearly becomes akin to an in personam action than to one in rem, subject to the qualification that dissolution must be accomplished by a state having an interest in the marital *status* of at least one of the parties.[98] Once again domicil is required in most jurisdictions to assure that the forum has a substantial interest in the marital status. By the same reasoning previously applied to the in rem analogy, the requirement of one year's presence should be equally acceptable since domicil may or may not locate the state with the greatest interest in the marital status of the parties and therefore is itself an imperfect rule. The chief criticism of domicil as a criterion in this type of situation is that the control of the state of true interest in the marriage easily can be defeated by means of a short visit and some relatively painless perjury.[99] As a matter of fact, domicil often defeats its own purpose; that is, a very short period of residence is often

[97] Ibid.
[98] Williams v. North Carolina (I), 317 U.S. 287 (1942).
[99] See note 17 supra and accompanying text.

justified by the fact that it is accompanied by the allegation of an intent to remain indefinitely. The Texas statute, lacking this justification, requires presence for an entire year. Viewed from this standpoint, it makes circumvention of the divorce laws of a particular state more difficult than does a requirement of technical domicil. For example, while it is financially feasible for many dissatisfied spouses to spend six weeks in another state, the cost of a year's residence would be prohibitive.

If it is held that the Texas statute satisfies the requirements of full faith and credit, it will provide former spouses with greater certainty as to the finality of their divorces.[100] The only jurisdictional fact which could be relitigated is the objective fact of one year's presence, not the subjective intent of the complaining spouse.

B. *Distinction Between Internal Validity and Recognition Elsewhere*

One area of uncertainty not limited to servicemen's divorces is the question of the *internal* validity of decrees which are not entitled to full faith and credit. Recent decisions provide some justification for saying that divorce judgments may be valid in the forum although not required to be recognized in other states.[101] Implicit in such a distinction is the view that jurisdiction for purposes of internal validity may differ slightly from the jurisdiction necessary for full faith and credit. Opposed to this view are the *Alton*,[102] *Granville-Smith*,[103] and *Jennings*[104] decisions, which apparently treat jurisdiction for internal validity purposes the same as for recognition elsewhere, and in effect require entitlement to full faith and credit before a decree may be valid in the forum.[105] For the writer, the preferable view is that jurisdiction necessary to entitle the decree to full faith and credit should not be required for validity within the forum. Admittedly, jurisdiction for internal validity should require some *reasonable* basis, and

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[100] See notes 13 and 14 supra and accompanying text.

[101] Alton v. Alton, 207 F.2d 667 (3d Cir. 1953); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Wheat v. Wheat, —Ark.—, 318 S.W.2d 793 (1958).

[102] Alton v. Alton, 207 F.2d 667 (3d Cir. 1953).

[103] Granville-Smith v. Granville-Smith, 349 U.S. 1 (1955).

[104] Jennings v. Jennings, 251 Ala. 73, 36 So. 2d 236 (1948).

[105] In the Alton case the court was not explicit in its use of "due process," but apparently the term referred to *substantive* due process because clearly there was no lack of *procedural* due process (unless the state of true domicil was being deprived of "property" without due process). To the writer it seems that substantive due process might be equated to jurisdiction in the conflict-of-laws sense and should be necessary to entitle a judgment to full faith and credit, but should not be required for establishing validity within the forum. On the other hand, procedural due process which concerns fair play, proper notice, opportunity to be heard, etc., is fundamental in our conception of justice, and a lack of it should, of course, deprive a judgment of validity even within the forum.

unquestionably procedural due process must be complied with; but when these two requirements have been met, compliance with substantive due process should be unnecessary to entitle a decree to validity within the forum. The decision of the Arkansas court in the *Wheat* case[106] appears to reach a legally desirable result by deciding internal validity without regard to the question of full faith and credit, although the writer believes that presence within the state for a period of only three months is not the *reasonable* basis necessary to confer jurisdiction for internal validity. Presumably, however, if the United States Supreme Court finds the decree is not entitled to full faith and credit and the Arkansas judgment is then challenged in Arkansas, the decree will not be valid even in that state.[107]

C. *Acceptance of a Substantial Interest as a Substitute for Domicil*

Since 1942, the year of the first *Williams* decision, the law of divorce jurisdiction has been undergoing extensive change. An impressive body of case law is building support for relaxing the rigid requirement of technical domicil so as to permit servicemen to secure divorce decrees based on presence in their duty state for a substantial period of time.[108] The highest courts of at least three states have upheld servicemen's statutes in decisions offering sound arguments for the validity of the decrees externally as well as internally.[109] Also, the New York courts have upheld a statute conferring jurisdiction to dissolve any marriage consummated in New York regardless of where the parties are domiciled at the time of the divorce.[110] On the basis of these facts it is reasonable to infer that the United States Supreme Court will be receptive to statutes such as the Texas servicemen's divorce act which in effect call for a relaxation of the rigid requirements of technical domicil. This inference appears all the more reasonable when it is recognized that the former Supreme Court decisions stating that domicil is essential to full faith and credit may be distinguished on the ground that in each of those cases

[106] Wheat v. Wheat, —Ark.—, 318 S.W.2d 793 (1958).

[107] The challenge could arise in this manner: The defendant spouse might seek to enforce in Arkansas a judgment from the domiciliary state based on a finding by the state of domicil that the Arkansas court was without jurisdiction. The out-of-state decree, if entitled to full faith and credit, would force Arkansas to recognize it even though it meant setting aside the original Arkansas decree.

[108] Mills v. Mills, 153 Fla. 746, 15 So. 2d 763 (1943); Craig v. Craig, 143 Kan. 636, 56 P.2d 464 (1936); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wilson v. Wilson, 58 N.M. 411, 272 P.2d 319 (1954); Crownover v. Crownover, 58 N.M. 597, 274 P.2d 127 (1954); Wood v. Wood, —Tex.—, 320 S.W.2d 807 (1959).

[109] Craig v. Craig, 143 Kan. 636, 56 P.2d 464 (1936); Wallace v. Wallace, 63 N.M. 414, 320 P.2d 1020 (1958); Wood v. Wood, —Tex.—, 320 S.W.2d 807 (1959).

[110] David-Zieseniss v. Zieseniss, 205 Misc. 836, 129 N.Y.S.2d 649 (1954).

the divorce had been granted in a state which required domicil.[111] If this distinction is drawn, it will not be necessary to overrule those cases stating that domicil is indispensable. However, even if the extension of full faith and credit to decrees granted under servicemen's divorce statutes does require the limited overruling of prior decisions, the change would be no more radical than that effected by the first *Williams* case[112] when it overruled the decision in *Haddock v. Haddock*.[113]

Roger Rhodes

[111] See authorities cited note 2 supra.
[112] See cases cited note 11 supra.
[113] See note 35 supra.